91-495

No. _____

In the Supreme Court of the United States

October Term, 1991

WORLDWIDE CHURCH OF GOD; LEROY NEFF, as Executor of the Estate of HERBERT W. ARMSTRONG; RAYMOND McNAIR; and RODERICK C. MEREDITH,

Petitioners,

v.

LEONA McNAIR,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,* and
Bruce A. Armstrong
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, California 90406
Telephone: (213) 458-1000

RALPH K. HELGE & ASSOCIATES,
Ralph K. Helge, and
Jeffrey A. Lowery
440 West Green Street
Pasadena, California 91105
Telephone: (818) 304-4000

Attorneys for Petitioner
WORLDWIDE CHURCH OF GOD

BROWNE & WOODS, and
Allan Browne
450 North Roxbury Drive
Seventh Floor
Beverly Hills, California 90210
Telephone: (213) 274-7100

Attorneys for Petitioners
LEROY NEFF, as Executor of the Estate of HERBERT W. ARMSTRONG; RAYMOND McNAIR; and RODERICK C. MEREDITH

*Counsel of Record

Westside Law Publishers Los Angeles, California (213) 207-0272

QUESTION PRESENTED

Petitioners Worldwide Church of God, Leroy Neff, as executor of the estate of Herbert W. Armstrong, Raymond McNair, and Roderick C. Meredith, present the following question for review:

> May a finding of constitutional malice[1] in a defamation action properly be based upon a chain of speculative inferences emanating from the supposed truthfulness of the plaintiff or from the supposed lack of credibility of a defendant?

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[1]The term "constitutional malice" is used in this petition to mean "actual malice," as defined by this Court in *New York Times Company v. Sullivan*, 376 U.S. 254, 279-280 (1964).

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To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners Worldwide Church of God, Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, Raymond McNair, and Roderick C. Meredith, respectfully pray that a writ of certiorari be issued to review the decision rendered by the Court of Appeal of the State of California, Second Appellate District, Division Five, after denial of review by the Supreme Court of California.

OPINIONS BELOW

Prior to the denial of review by the California Supreme Court, there was one reported decision, *McNair v. Worldwide Church of God*, 197 Cal.App.3d 363, 242 Cal.Rptr. 823 (1987) (*McNair I*), a copy of which is annexed as Appendix B to this petition. After *McNair I* became final, the trial court granted summary judgment in favor of all defendants, and copies of its judgment and opinion are attached as Appendices D and E. There was then an unreported decision (*McNair II*), reversing the summary judgment, a copy of which is annexed as Appendix A. A copy of the California Supreme Court's order denying review is attached as Appendix C. All of these decisions are discussed in the statement of the case below, as they reflect the defendants' twelve year quest to preserve their constitutional rights.

JURISDICTION

The order issued by the California State Supreme Court denying Worldwide Church of God's petition for review was filed on June 26, 1991. This Court's jurisdiction is invoked under 28 *U.S.C.* section 1257. This Court has jurisdiction since the California State Supreme Court finally determined an important constitutional issue. This is true regardless of any further proceedings that remain to be conducted in lower courts. *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 477 (1975).

This Court has set a *minimum* of four circumstances where it has jurisdiction over a case, without waiting for a lower court to finish its business. In most of these cases, jurisdiction is proper when delaying review would avoid "economic waste" and "delayed justice." 420 U.S.

at 478. This is precisely the situation here, where the defendants seek to avoid going through another long, difficult, and expensive trial, in violation of their constitutional rights. After twelve years of litigation, including a full jury trial and two appeals, justice should not be delayed any longer.

This case fits precisely within at least two separate categories established by this Court as tests for proper jurisdiction following a state court's final judgment. First, the outcome of further proceedings is "preordained" by the federal issue. 420 U.S. at 479. If constitutional malice is not a question of fact to be decided by a trier of fact based upon a chain of speculative inferences, then there will be no triable issue of material fact, and the defendants are entitled to summary judgment.

Secondly, if the federal question is not decided now, review may not be available later, regardless of the outcome of the case. 420 U.S. at 481. If the defendants win on the merits, this issue will obviously be moot. If the plaintiff prevails, review may be precluded, since the plaintiff may successfully claim that the *McNair II* court's decision is the law of the case. In *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), this Court faced a situation analogous to the present case, where the merits of the case still had to be litigated in state court. 418 U.S. at 246. This Court found that the state court had made a final judgment, and the case was ripe for review regardless of the further state court proceedings. 418 U.S. at 246-247; see also, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

The *Miami Herald* court also noted that delaying their decision to review the First Amendment claim until after

the state court trial would "leave unanswered. . . an important question of freedom of the press under the First Amendment," putting it in "an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 n.6 (1974), quoted in Cox, 420 U.S. at 486.[2] The importance of an authoritative determination of the constitutional malice issue in this case establishes this Court's jurisdiction and justifies certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First and Fourteenth Amendments to the Constitution of the United States. The relevant text of each of these amendments is set forth in Appendix G.

STATEMENT OF THE CASE

1. Leona McNair's Marriage to a Minister.

The story begins with the marriage of Raymond McNair and Leona McNair in 1955. *McNair v. Worldwide Church of God,* 197 Cal.App.3d 363, 367, 242 Cal.Rptr. 823, 825 (1987). *(McNair I).* The marriage lasted until 1976, when their divorce became final. 197 Cal.App.3d at 368, 242 Cal.Rptr. at 826. During their marriage, Raymond McNair was an evangelist minister of the Worldwide Church of God. 197 Cal.App.3d at 367, 242 Cal.Rptr. at 825. Mr. McNair was the director of the Church for Europe, Africa, the Middle East, Asia,

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[2] *Flynt v. Ohio,* 451 U.S. 617 (1981) is inapposite to the present situation, since in that case the "nonfinal" state court decision was based on the issue of whether there was selective prosecution under the Equal Protection clause and the First Amendment issue was not yet addressed by this Court.

and Australia. Leona McNair assisted her husband in all of his works and traveled extensively with him. Pursuant to the practices of the Church, Leona McNair, after marriage, became 50 percent of her husband's ministry. 197 Cal.App.3d at 367, 242 Cal.Rptr. at 825. Leona McNair enjoyed a prominent position in the Church, and was known in the Church as the "first lady of England."

Herbert W. Armstrong founded the Worldwide Church of God in 1933, which was originally known as the Radio Church of God. 197 Cal.App.3d at 366, 242 Cal.Rptr. at 825. The church is a fundamentalist Christian church, in the sense that its religious beliefs are rooted in the Old and New Testaments, and its followers' life styles are guided by Biblical strictures. Mr. Armstrong was the Pastor General or Apostle and the spiritual leader of the Church. 197 Cal.App.3d at 366, 242 Cal.Rptr. at 825.

Leona McNair eventually became disenchanted with her marriage and the Church. 197 Cal.App.3d at 368, 242 Cal.Rptr. at 826. She was formally excommunicated, or considered as a person who "was no longer with us" in February of 1979. 197 Cal.App.3d at 369, 242 Cal.Rptr. at 827.

2. The Divorce and Remarriage Controversy in the Worldwide Church of God and the McNair Divorce.

The Worldwide Church of God has strict views on the permanence of marriage, and obtaining a divorce is very difficult. 197 Cal.App.3d at 366, 242 Cal.Rptr. at 827. Up until 1974, the Church only recognized two grounds for divorce and permissible remarriage, fraud and "porneia," which is gross immorality. 197

Cal.App.3d at 367, 242 Cal.Rptr. at 825.

In 1974, a third ground, desertion, was added as a proper reason for divorce and remarriage. 197 Cal.App.3d at 367, 242 Cal.Rptr. at 826. According to the Holy Bible, specifically, First Corinthians, Chapter 7, verse 15, if an "unbeliever" departs, the believing spouse of that person is no longer bound in marriage. 197 Cal.App.3d at 367, 242 Cal.Rptr. at 826. Therefore, if the unbeliever was found "not pleased to dwell," a scriptural concept, then the believer was not bound to dwell with the unbeliever in marriage. The unbeliever would then be viewed by the Church as having spiritually departed from the marriage. Additionally, divorces which occurred before conversion were now forgiven, regardless of their grounds. The controversy over this new doctrine surrounding divorce and remarriage continued for years.

The Church's controversy over divorce and remarriage coincided in time with the deterioration of the McNairs' marriage. Raymond McNair became deputy chancellor of Ambassador College in Pasadena, California, a Church-affiliated institution, after returning to the United States from England in 1973. 197 Cal.App.3d at 367, 242 Cal.Rptr. at 826. Shortly thereafter, he became Senior Editor of the *Plain Truth* magazine, a Church publication. Although Raymond McNair remained loyal to the Church and sided with the Church conservatives, fighting against the different "liberal" changes, Leona McNair became very disenchanted with the doctrines and leadership of the Church, and her role as a minister's wife. 197 Cal.App.3d at 367-368, 242 Cal.Rptr. at 826. Nonetheless, the McNairs continued living in the same house together for more than a year after the divorce petition was filed, and Mr. McNair

unsuccessfully attempted to reconcile with his wife. 197 Cal.App.3d at 368, 242 Cal.Rptr. at 826. Raymond McNair had filed for divorce in June of 1975, but the divorce did not become final until September of 1976. 197 Cal.App.3d at 368, 242 Cal.Rptr. at 826.

Not only were there serious problems between Mr. McNair and his wife, but also the McNair divorce proceedings became a subject of controversy in the Church community. [R.T. 2307-2308.][3] This was due to the McNairs' high rank and visibility. When he later remarried, the "spotlight" was on him. [R.T. 2520.] There was thus a clear need for the Church to clarify its doctrine concerning divorce and remarriage, to show that there was no special treatment for one particular high ranking minister of the Church, and that Mr. McNair's remarriage did not violate the teachings of the Church.

3. The Remarks Made About Leona McNair at the 1979 Minister's Conference.

The Church held its annual meeting of ministers in Tucson, Arizona, in January of 1979. 197 Cal.App.3d at 369, 242 Cal.Rptr. at 827. It was attended by ministers, their wives, and support staff. Dr. Roderick Meredith,[4] a director of pastoral administration for the Church, whose responsibility was to clarify doctrinal issues within the ministry and counsel ministers with personal problems, felt responsible to address the divorce and remarriage controversy. 197 Cal.App.3d at 369, 242 Cal.Rptr. at 827. Approximately 400 to 500 ministers, along with their wives, attended the conference. [R.T.

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[3]"R.T." refers to the reporter's transcript for the 1984 jury trial.

[4]Dr. Meredith was the brother-in-law of plaintiff Leona McNair and defendant Raymond McNair, having married Mr. McNair's sister. [R.T. 1124.]

1036, 1146.] No outsiders or reporters were allowed to be present. [R.T. 1185, 2280.] The doctrinal discussion by Dr. Meredith which gave rise to the allegations of slander in this lawsuit occurred on the fourth and final day of the ministerial conference. The supposedly defamatory words consisted of a two minute portion of a speech that lasted approximately three and a half hours. [R.T. 1193, 1377.] The plaintiff herself admitted that these comments were made for the purpose of clarifying Church doctrine on divorce and remarriage. [R.T. 1526.]

Dr. Meredith explained why Mr. McNair was entitled to get a divorce in the eyes of the Church.[5] Leona McNair had been "virtually cursing him," as well as "cursing Mr. Armstrong," the head of the Church. He explained that Leona McNair "departed so far that she is one of the major enemies of God's Church in Southern California." Thus, pursuant to "our understanding on divorce and remarriage which the whole Church came to back in 1974," he said that "we have come to realize that what God has bound he can unbind." In view of the circumstances, Herbert Armstrong, the head of the Church, encouraged Mr. McNair to divorce Leona "since she was simply wanting to keep him on the string and get a free ride while she cursed him and would not have anything to do with him." Leona McNair had simply abandoned her duties as a wife and mother. [C.T.-I 3336-3339.][6]

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[5]In the interest of brevity, only the highlights of the comments made by Dr. Meredith are cited in this paragraph, with a citation to the full text appearing at the end of the paragraph. The same procedure is followed in the next paragraph, concerning the Pastor's Report.

[6]"C.T.-I" is the clerk's transcript for *McNair I*.

4. The Article in the *Pastor's Report*.

There were many ministers in the Church who did not attend the 1979 ministerial conference [R.T. 2285], and it was thought that the entire subject of divorce and remarriage generally, and the circumstances of the McNair divorce in particular, would best be clarified in writing. [R.T. 2698.] Therefore, Dr. Meredith prepared an article that was published in the June 25, 1979, issue of the *Pastor's Report,* a publication for ministers of the Worldwide Church of God. The article specified in writing the three recognized legitimate reasons for divorce and remarriage, and explained why the McNair divorce was theologically justified on the ground of desertion, and why Mr. McNair's remarriage was binding in God's eyes. [C.T.- I 14-15.]

5. The Pleadings in the Present Case.

On July 13, 1979, plaintiff Leona McNair filed her original complaint in this action [C.T.-I 1], which was superseded by her second amended complaint, the operative pleading, on September 23, 1980. [C.T.-I 183.] She asserted claims of libel, slander, and intentional infliction of emotional distress, and sought more than one hundred million dollars in damages. [C.T.-I 194.] The defendants named included the Worldwide Church of God, Church founder Herbert W. Armstrong, Raymond McNair, and Roderick C. Meredith.

The Church filed an answer to the second amended complaint on December 5, 1980. [C.T.-I 255-270.] All of the material allegations made by the plaintiff were denied, and various affirmative defenses were asserted, including the constitutional protections of freedom of speech, press, and religion. Moreover, it was alleged that, even if the oral and written statements made were

defamatory, they were not made with constitutional malice, or the knowledge that they were false or with a reckless disregard for the truth. [C.T.-I 265-267.]

6. The 1984 Jury Trial.

The case went to trial on July 5, 1984, before a jury. [R.T. 7.] The plaintiff was permitted to trample on the constitutional rights of the defendants, and introduce evidence of Church practices and doctrines, including supposedly expert testimony of several former ministers of the Church. [R.T. 1328, 1961-1962.]

The jury awarded plaintiff Leona McNair $260,000.00 in compensatory damages, even though there was virtually no evidence of any actual damages, plus $1,000,000.00 in punitive damages. [C.T.-I 2822.]

7. The 1987 Court of Appeal Decision.

In *McNair v. Worldwide Church of God,* 197 Cal.App.3d 363, 242 Cal.Rptr. 823 (1987), (*McNair I),* the Court of Appeal corrected the injustice represented by the runaway jury verdict, reversing the judgment entered on that verdict. The fundamental issue addressed was to "balance the reputational interest of our citizenry against the interests protected by the First Amendment's free exercise of religion clause." 197 Cal.App.3d at 375. In doing so, the court properly adopted "the analysis and theories set forth in *New York Times Company v. Sullivan* . . . and its progeny." 197 Cal.App.3d at 375.

In *McNair I,* the court recognized that "doctrinal explanation by a duly authorized minister is as much an exercise of religion as any other religious practice." 197 Cal.App.3d at 375 (footnote 10), 242 Cal.Rptr. at 831. Thus, such expression of religious views may be viewed both as a religious practice and as the exercise

of the freedoms of speech and of the press.

In light of its recognition of the applicability of the *New York Times* constitutional malice rule, and its examination of the record, the court stated that "[t]he judgment is reversed and the cause remanded for a new trial consistent with the requirements of this opinion." 197 Cal.App.3d at 380, 242 Cal.Rptr. at 834.

8. The Defendants' Motion for Summary Judgment.

On May 27, 1988, all defendants moved for summary judgment. [C.T.-II 5177-5351.] Summary judgment was sought on the ground that the plaintiff had not produced and could not produce clear and convincing evidence of constitutional malice on the part of the defendants with respect to the statements made about her. [C.T.-II 5182-5196.]

In support of the motion for summary judgment, Dr. Roderick C. Meredith submitted an eight page declaration in which he set forth, in detail, his sources of information for what was said and written by him about Leona McNair. He noted that he had known Raymond McNair since 1949, finding him to be always honest, truthful, and trustworthy. [C.T.-II 5224.] In June of 1975, Dr. Meredith and his wife returned to Pasadena from England, and it became apparent to him that the McNairs "were having considerable marital difficulties and that Leona was very bitter against the Worldwide Church of God." [C.T.-II 5224.] In particular, she was making derogatory statements about the Church and its founder, had quit attending the Worldwide Church of God, was attending meetings of a former Church minister who had started his own separate and competing religious organization, and had rejected many of the

Church's doctrines. [C.T.-II 5224.] Dr. Meredith noted that his sons had spent a great deal of time with their cousins, Bruce and Joe McNair, following the return of the Meredith family from England in June of 1975. The sons reported to him that "Aunt Leona blew up at her husband and used words that I would call 'curse words' such as 'damn' and 'hell' referring to her husband, Herbert W. Armstrong, Garner Ted Armstrong, and the Worldwide Church of God." [C.T.-II 5225.]

Dr. Meredith proceeded to explain the religious background of the issue of divorce and remarriage, and the need within the Church to explain the McNair divorce and remarriage and their religious justification. He stated that he believed what he said and wrote about Leona McNair, a belief based primarily on religious principles, on what Raymond McNair told him concerning the breakup of the marriage, and on what he was told by his own sons. Moreover, Leona McNair herself, his own wife, and other long time ministers and members of the Worldwide Church of God confirmed the information that formed the basis of the comments by Dr. Meredith about Leona McNair.

The statements made by Dr. Meredith in his declaration concerning his state of mind, as to what was said and written about Leona McNair, were supported by the declarations of R. Joseph McNair and Bruce D. McNair (sons of Raymond and Leona McNair), by declarations of James P. Meredith and Michael R. Meredith (sons of Dr. Roderick C. Meredith), and by the declaration of Raymond F. McNair. These five declarations confirmed the major sources of information on which Dr. Meredith relied when he analyzed the McNair divorce and remarriage in the context of explanation of religious doctrine.

9. The Opposition to the Motion for Summary Judgment.

On October 12, 1988, plaintiff Leona McNair filed extensive papers in response to the defendants' motion for summary judgment. [C.T.-II 5742-5796.] However, many parts of the declarations submitted were irrelevant, incompetent, and inadmissible, failing to address the constitutional malice issue properly.

In effect, Leona McNair argued that the declarations of her sons, her nephews, her former husband, and her former brother-in-law should all be disregarded because they came from members of the Worldwide Church of God. [C.T.-II 5764-5765.] She also argued that the knowledge gained by Roderick Meredith from his own observations and those of his sons could only have been acquired after her divorce from Raymond McNair, since the Meredith family had been in England. [C.T.-II 5765-5767.] However, she offered no explanation why she considered the time of her divorce to be the time of filing of the divorce petition rather than the time of final judgment, and she made no distinction between civil and religious determinations of the right to obtain a divorce.[7]

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[7]At trial, Dr. Meredith testified that, in his comments about Leona McNair, he had in mind events occurring, in some cases, after the filing of the petition for divorce but prior to the time of the final decree of divorce, when discussing Leona McNair's conduct toward her husband. [R.T. 1188-1191.] During most of this time period, the McNairs were living in the same house, attempting a reconciliation. [R.T. 1188-1189.] Moreover, it is clear from his testimony as a whole that Dr. Meredith was concerned about divorce in the religious rather than legal sense. It is undisputed that Dr. Meredith returned from England and was back in Pasadena for most or all of this period of time.

In addition to her short declaration of September 6, 1988 [C.T.-II 5764-5767], plaintiff submitted copies of several other declarations signed by her that had been used in earlier proceedings [C.T.-II 5768-5779], and a copy of a declaration by her daughter, Ruth McNair-Knasin. [C.T.-II 5780-5785.] The daughter's declaration, dated September 2, 1982, had also been drafted in connection with earlier proceedings. Neither it nor the prior declarations of Leona McNair addressed Roderick C. Meredith's state of mind or his sources of information, even though they are laden with argument, emotional outpouring, and unsupported conclusions.

10. The Judgment and the Appeal.

The motion for summary judgment was heard on October 21, 1988, and was granted. [C.T.-II 5838.] The reasoning of the trial court was explained in a twelve page memorandum. [C.T.-II 5827-5837A.] Judgment was entered accordingly on November 21, 1988. [C.T.-II 5839-5841.] The plaintiff then appealed. [C.T.-II 5961-5962.]

11. The Decision of the Court of Appeal.

In a bizarre opinion, a copy of which is attached as Appendix A, the Court of Appeal reversed the summary judgment in favor of defendants. The court adhered to the holding that the plaintiff must prove constitutional malice. However, finding *McNair I* ambiguous and confusing, the three justices who decided *McNair II* rejected the holding, characterizing it as "dicta," that the plaintiff had failed to present evidence at the 1984 trial that was sufficient to support a finding of constitutional malice. Rather, the McNair II court apparently reasoned that, such malice may simply be inferred from a finding of lack of credibility on the part

of defendant Roderick C. Meredith, in any part of his testimony.

12. The Petitions for Rehearing and Review.

On April 11, 1991, defendant Worldwide Church of God filed a petition for rehearing, as did the remaining defendants. The two petitions pointed out the serious legal and factual errors appearing in *McNair II,* including the Court of Appeal's apparent conclusion that a finding of constitutional malice may be based upon a chain of speculative inferences emanating from the plaintiff's alleged truthfulness. On April 24, 1991, the two petitions for rehearing were denied, in a three page order, a copy of which is attached as Appendix F. On May 6, 1991, the petitioners filed two petitions for review, which were subsequently denied by the Supreme Court of California. A copy of the order is attached as Appendix C.[8]

13. The Urgent Need for Review on a Writ of Certiorari.

Unless this court acts to protect them and to assure enjoyment of their constitutional rights, the defendants will face another circus, probably similar to that visited upon them in the summer of 1984. Moreover, the right to appeal from a future judgment based on a second runaway verdict might prove to be grossly inadequate, because the plaintiff may argue that *McNair II* constituted the law of the case with respect to the sufficiency of the plaintiff's evidence under the clear and convincing evidence standard for proof of constitutional malice. As will be shown below, pursuant to rule 10.1(c) of the Supreme Court Rules, the constitutional malice

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[8]The present issue was timely and properly raised as shown in Appendix H.

issue is an important question of federal law decided by a state court in a manner which conflicts with applicable decisions of this Court. Therefore, petitioners Worldwide Church of God, Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, Raymond McNair, and Roderick C. Meredith, respectfully request that this Court grant their petition for a writ of certiorari.

ARGUMENT

I.

The Requirement of Proving Constitutional Malice Ensures Breathing Space for the First Amendment Guarantees of Freedom of Speech and Freedom of Religion, Liberties Essential to the Maintenance of a Free and Democratic Society.

This Court has described First Amendment freedoms as "delicate and vulnerable, as well as supremely precious in our society." *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 433 (1963). However, these rights guaranteed by the First Amendment require "breathing space" in order to survive, 371 U.S. at 433, and thus, our government may only regulate this area with "narrow specificity." *New York Times Company v. Sullivan,* 376 U.S. 254, 271 (1964). The constitutional malice rule is an important judicially created rule which provides the First Amendment freedoms of expression with the "breathing space" necessary for their survival. *Hustler Magazine v. Falwell,* 108 S.Ct. 876, 880 (1988). The erroneous conclusions of the *McNair II* court threaten the very livelihood of the freedom of speech and freedom of religion. If the constitutional malice rule is allowed to be selectively applied according to the whim of the trier of fact, as allowed by the *McNair II* court, over a quarter of a century of law created by this Court to protect

our precious First Amendment rights is in grave jeopardy. As will be discussed below, such a determination is nothing but a judicial aberration, going against principles well established long ago by this Court.

II.

A Finding of Constitutional Malice May Not Properly Be Based Upon a Chain of Speculative Inferences Emanating From the Plaintiff's Supposed Truthfulness or From a Defendant's Alleged Lack of Credibility.

McNair II reaffirms the rule of law announced in McNair I, that the plaintiff in a defamation case arising from religious speech must prove constitutional malice, but it fails to interpret and apply the rule correctly. This Court has the duty not only to elaborate on constitutional principles, but to examine the evidence to ensure that those principles have been constitutionally applied. *New York Times Company v. Sullivan,* 376 U.S. 254, 285 (1964). The important values protected by the constitutional malice rule "make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied." *Bose Corporation v. Consumer Union of United States, Inc.,* 466 U.S. 485, 501 (1984), *rehearing denied,* 467 U.S. 1267 (1984).

The constitutional protection afforded by the constitutional malice rule is so weak, if *McNair II* is right, that the rule itself is little more than an abstract principle of law to be followed or rejected in the discretion of the trier of fact. The constitutional malice principle, so carefully refined in over a quarter century of legal decisions, should not become a paper tiger. The plaintiff should not be allowed to trample on the constitutional rights of freedom of speech and freedom of religion.

When *McNair I* extended the protection of the constitutional malice rule to religious speech, it also imported the large body of law delineating the constitutional malice principle, a body of law that emanates from *New York Times Company v. Sullivan,* 376 U.S. 254 (1964). Nonetheless, *McNair II* has refused to apply this body of constitutional law properly to the facts before it, even assuming that the *McNair II* court was not bound by the holding of *McNair I* on the sufficiency of the evidence.

Constitutional malice involves a person's actual state of mind with respect to the truth or falsity of what he has said or written. The truth of the utterance itself is irrelevant. *St. Amant v. Thompson,* 390 U.S. 727, 731-733 (1968). It is the person's actual state of mind, rather than any constructive state of mind, that must be examined. *Garrison v. State of Louisiana,* 379 U.S. 64 (1964). Even a determination that a defendant could not reasonably believe the truth of his statements is not sufficient to establish constitutional malice. 379 U.S. 64 at 78-79. To be constitutionally malicious, a defendant must in fact entertain serious doubts as to the truth of his publication. *St. Amant,* 390 U.S. at 731 (1968). Generally, a finding of constitutional malice may not be based upon inadequate investigation of the facts. *Beckley Newspapers Corporation v. Hanks,* 389 U.S. 81 (1967).

The *McNair II* court has found that a trier of fact could believe that the plaintiff was truthful in denying what was said about her; that witnesses with contrary testimony must therefore be deemed untruthful; that a witness who is untruthful in part of his testimony may be disbelieved in all of his testimony; and that the defendants were therefore guilty of constitutional malice.

(*McNair II*, pages 28-32.) This is nothing but legal alchemy. This line of reasoning is not only preposterous, making a mockery of the constitutional malice principle, but has been specifically rejected by this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986); see also, *McCoy v. Hearst Corporation*, 42 Cal.3d 835, 845-846, 231 Cal.Rptr. 518, 525, 727 P.2d 711 (1986), *cert. denied* 481 U.S. 1041 (1987), (*McCoy I*).

In *Bose Corporation v. Consumers Union*, 466 U.S. 485 (1984), this court explained the proper role of appellate courts in constitutional malice cases, as follows:

> "The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court--must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " 466 U.S. at 510-511; see, *Beckley Newspapers Corporation v. Hanks*, 389 U.S. 81, 82 (1967).

Judges should determine constitutional malice as a question of law because of the "unique character" of the First Amendment interest protected by the constitutional malice rule. *Harte-Hanks Communications, Inc. v. Connaughton,* 109 S.Ct. 2678, 2694-2695 (1989). This country was founded with a commitment to free expression. Such a commitment mandates that the law provide a "breathing space" for the First Amendment protections. This Court warned that, "the more illusive the (constitutional malice) standard, the less protection it affords." 109 S.Ct. at 2695.

The *Bose* court also noted that, if the testimony of a witness is not believed, "the trier of fact may simply disregard it." 466 U.S. at 512. However, the discredited testimony normally "is not considered a sufficient basis for drawing a contrary conclusion." 466 U.S. at 512.

McNair II simply disregarded the teaching of the *Bose* case as well as the holding of another decision of this Court, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Like *McNair II, Anderson* was decided in the context of review of a summary judgment. This court firmly rejected the contention that "the defendant should seldom if ever be granted summary judgment, where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue." 477 U.S. at 256. Rather, in order to defeat a motion for summary judgment, a plaintiff in a case who is required to prove constitutional malice must present clear and convincing evidence that might support a finding of constitutional malice. 477 U.S. at 257.

In *McCoy I,* the California Supreme Court applied the approach of *Bose* and *Anderson* on the constitutional malice issue. *McCoy I* was cited to the *McNair II* court, but to no avail.

The *McNair II* court attempts to distinguish the court's decision in *McCoy I* on the ground that the defendants in *McCoy I* had no "motive" with respect to the plaintiffs, but were simply disinterested journalists. This purported distinction illustrates that the *McNair II* court confused the defendants' state of mind with respect to the plaintiff with their state of mind concerning what was said and written. Constitutional malice concerns only the latter. *Reader's Digest Association v. Superior Court,* 37 Cal.3d 244, 257, 208 Cal.Rptr. 137, 145, 690 P.2d 610 (1984); *Fletcher v. San Jose Mercury News,* 216 Cal.App.3d 172, 185-186, 264 Cal.Rptr. 699, 705 (1989), *review denied* (1990), *cert. denied* 111 S.Ct. 51 (1990); *Widener v. Pacific Gas and Electric Company,* 75 Cal.App.3d 415, 434, 142 Cal.Rptr. 304 (1977). Furthermore, *McNair II* represents a misunderstanding of the concept of "motive."

A "motive" is a "cause or reason that moves the will and induces action." *Black's Law Dictionary,* 6th Edition, page 1014. "Motive is an idea, belief or emotion that impels or incites one to act in accordance with his state of mind or emotion." *People v. Gibson,* 56 Cal.App.3d 119, 129, 128 Cal.Rptr. 302 (1976).

One does not have a "motive" to believe or disbelieve something. Rather, belief is the result of faith, reason, and evidence. The legal concept of "motive" relates to action, not to belief. Thus, the refusal of the *McNair II* court to follow *McCoy I* was clearly erroneous. Moreover, the *McNair II* court's reference to the defendants' "motives" could only mean that the court was confusing constitutional malice with ordinary malice, which concerns ill will or bad intentions. Evidence of ordinary malice cannot be equated with clear and convincing proof of constitutional malice. *Harte-*

Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678, 2685 (1989); see, *Beckley Newspapers Corporation v. Hanks,* 389 U.S. 81 (1967).

A recent federal constitutional malice decision illustrating the irrelevance of motive is *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991), *cert. denied,* 111 S.Ct. 2814 (1991). In *Reuber,* in taking away a large judgment for want of constitutional malice, the Fourth Circuit rejected the approach of *McNair II* with regard to a defendant's motivation. In particular, the court found it irrelevant that one of the defendants "had a strong incentive to harm Reuber's professional reputation." 925 F.2d at 715. Moreover, an economic incentive on the part of one of the defendants, "a profit motive," was similarly found irrelevant to the constitutional malice issue. 925 F.2d at 715-716.

The cornerstone of *McNair II* is the proposition that, through a chain of speculative inferences, constitutional malice may possibly be inferred from a possible finding of lack of credibility on the part of defendant Roderick C. Meredith. This reasoning is constitutionally impermissible. '[A] determination of actual malice [constitutional malice] cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial." *Newton v. National Broadcasting Company,* 930 F.2d. 662, (9th Cir. 1991).

The *Newton* case simply cannot be distinguished from *McNair II. Newton* holds that, as a matter of law, constitutional malice may not be inferred from lack of credibility on the part of a defendant, while *McNair II* expresses the contrary view. *Newton* is, of course, consistent with federal and state constitutional malice decisions, while *McNair II* is a lawless aberration.

McNair II makes the serious mistake of lumping

together all of the sources that defendant Roderick C. Meredith relied upon, failing to distinguish those statements based on personal observation from statements based on or confirmed by independent sources. However, when the actual declaration of Dr. Meredith is examined, it appears quite clearly that certain statements were based on personal observations. These statements were never directly contradicted even by Leona McNair. Other statements were based on sources, comments made by close relatives, which Dr. Meredith had no reason to disbelieve. Nothing in the record shows that the family members have reputations for being untruthful. *See, St. Amant v. Thompson,* 390 U.S. 727, 733 (1968). Even, assuming for the sake of argument, if Leona McNair had denied any of the acts described by Dr. Meredith's statement and contradicted Dr. Meredith, this would not be "convincing proof" that Dr. Meredith acted with reckless disregard for the truth or falsity of his statement, or with the "high degree of awareness of . . . probable falsity" required for constitutional malice. *Beckley Newspapers Corporation v. Hanks,* 389 U.S. 81, 84-85 (1967).

The *McNair II* court's inference of a possible inconsistency that, because Dr. Meredith declared that he had spoken to R. Joseph McNair, son of Leona and Raymond McNair, and that the son did not expressly declare that this conversation took place, is irrelevant to the constitutional malice issue. Any supposed inconsistencies created at the time the declaration was made does not mean that Dr. Meredith realized any inaccuracy when he made the allegedly defamatory statement about Leona McNair.

If the declarations in support of and in opposition to the defendants' motion for summary judgment are

read together, as a whole, in the manner required by the *McCoy I* decision, it is obvious that the purported conflicts in the evidence are insignificant. There is certainly nothing that constitutes clear and convincing evidence of constitutional malice on the part of defendant Meredith.

The key source of apparent discrepancies in the evidence concerns the timing of the McNair divorce. The plaintiff simply assumes that the time of a divorce is the time that one of the parties to a marriage files a petition in a civil court seeking dissolution of that person's marriage. Other people might think that the time of a divorce is the date of an interlocutory or final decree. However, from the record as a whole, it is obvious that defendant Meredith was concerned with the ecclesiastical validity of the divorce, and the time of the McNair divorce may have been the time that the Worldwide Church of God found the civil divorce to be valid in the eyes of the Church.

The issue Dr. Meredith addressed was the controversy over the Church's doctrinal issue of divorce and remarriage. Leona admitted that this was the issue that was addressed. It was not the doctrinal issue of "filing a petition for dissolution." Hence it is obvious that the relevant time period in Dr. Meredith's mind was not the date the petition for divorce was filed, but rather the date of Mr. Raymond McNair's divorce becoming final, at the very earliest. Hence all the facts occurring during the McNair marriage to that date were relevant, in Dr. Meredith's mind, to the issue he had to address.

Even Leona McNair acknowledges that there was a factual basis for the comments made about her if reference is made to the time frame between the filing of the divorce petition and the time that there was

ecclesiastical recognition of the propriety of the divorce. Thus, the effort to find constitutional malice in the mind of defendant Meredith must fail, when one examines the record as a whole, and realizes that Dr. Meredith meant one point in time when he referred to the timing of the McNair divorce, while Leona McNair conceived the time of her divorce to be a different, and earlier, point in time.

When the record of the present appeal is viewed properly, as a whole, as required by *McCoy I* and other constitutional malice cases, it is quite clear that plaintiff Leona McNair has no right to recover. "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence." *McCoy v. Hearst Corporation,* 227 Cal.App.3d 1657, 1661, ___ Cal.Rptr. ___ (1991), *review denied* (1991) *(McCoy II).* The *McNair I* court generously allowed the plaintiff the opportunity to present any newly discovered evidence of constitutional malice, or any evidence that she already had but had not produced, since she had not been required to come forward with it. No new evidence was offered. The requirement of proof of constitutional malice by clear and convincing evidence has not been satisfied. *McNair II* should have adhered to *McNair I,* just as *McCoy II* adhered to *McCoy I.*

If *McNair II* has been correctly decided, the constitutional malice rule has been emasculated. Every plaintiff in a defamation case claims that what was said or written about the plaintiff was untrue. If the trier of fact finds the statement untrue, constitutional malice may simply be inferred, according to the apparent

holding of *McNair II*. Constitutional protection of free expression would be destroyed by mere speculation by the trier of fact. As stated by Justice Goldberg in his concurring opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the real issue is if constitutionally protected freedom of speech:

> "[C]an be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of a speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained." 376 U.S. at 301.

A fair examination of the record, faithful to the constitutional principles developed by this Court and by other appellate courts, shows that the defendants are entitled to judgment. There is no evidence of constitutional malice, and certainly no clear and convincing evidence of constitutional malice in this case. Any contrary decision would force the defendants to choose between exercising their First Amendment rights and facing a long and meritless lawsuit.

III.

Conclusion.

The fragile constitutional malice rule, which ensures that the First Amendment rights to free speech and free religion are afforded their proper place in our society, and prevents this democratic nation from turning into a place where people fear punishment for merely speaking their minds or exercising their religious beliefs, should not be applied in the discretion of the trier of fact. If constitutional malice may be inferred simply from

a finding that the plaintiff was truthful and that a defendant lacked credibility, then the rule itself would lose all of its force. The litany of cases decided by this Court, requiring more than a speculative chain of inferences for a finding of constitutional malice, deserve more respect than the *McNair II* court's ignorance of their very existence.

It is respectfully submitted that the Supreme Court of the United States should grant this petition, in order to consider the issue presented and, subsequently, should overrule and reverse the decision of the California Court of Appeal, so that this meritless lawsuit may finally be properly put to rest.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup, and
Bruce A. Armstrong

RALPH K. HELGE & ASSOCIATES,
Ralph K. Helge, and
Jeffrey A. Lowery

Attorneys for Petitioner,
WORLDWIDE CHURCH OF GOD

BROWNE & WOODS, and
Allan Browne

Attorneys for Petitioners,
LEROY NEFF, as Executor of the Estate of
HERBERT W. ARMSTRONG; RAYMOND McNAIR;
and RODERICK C. MEREDITH

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 20, 1991, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, California Supreme Court
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Clerk of the Superior Court
for the County of Los Angeles
for the
Honorable Richard A. Lavine
111 North Hill Street
Los Angeles, California 90012

Clerk, California Court of Appeal
Second Appellate District
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Mr. John Tate
150 E. Colorado Blvd.
Suite 202
Pasadena, California 91105
(818) 796-0305
(Attorneys for Respondent Leona McNair)

Horvitz & Levy
15760 Ventura Blvd.
Eighteenth Floor
Encino, California 91436
(213) 872-0802
(Attorneys for Petitioners Leroy Neff as Executor of the Estate of Herbert W. Armstrong, Raymond McNair; and Roderick C. Meredith)

Law Offices of
Ralph K. Helge
440 W. Green Street
Pasadena, California 91105
(818) 304-4000
(Attorneys for Petitioner Worldwide Church of God)

Mr. Michael L. Goldberg
Mandell, Lewis and Goldberg
A Professional Corporation
2000 Corporate Ridge
Suite 1075
McLean, Virginia 22102
(703) 734-9622
(*Attorneys for Respondent Leona McNair*)

Paul & Stewart
725 Arizona Avenue
Suite 406
Santa Monica, California
90401
(213) 458-4584
(*Attorneys for Respondent Leona McNair*)

Browne & Woods
450 North Roxbury Drive
Seventh Floor
Beverly Hills, California 90210
(213) 274-7100
(*Attorneys for Petitioners LeRoy Neff, as Executor of the Estate of Herbert W. Armstrong; Raymond McNair; and Roderick C. Meredith*)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 20, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)